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Antitrust in Germany and Japan: The First Fifty Years,
1947-1998 (review)

Mark Tilton

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lawyers”—though rightly resistant to the efforts of legislators to amend the constitution—will nonetheless need to rethink the literal reading of Article 9 to which the majority of them adhere, as well as the basic understanding of the relationship between constitutionalism and pacifism upon which this reading is predicated.

Antitrust in Germany and Japan: The First Fifty Years, 1947–1998. By John O. Haley. University of Washington Press, Seattle, 2001. xiii, 249 pages. \$65.00.

Reviewed by
MARK TILTON
Purdue University

Japanese antitrust has been of interest to many because weak antitrust has been associated with barriers to trade, investment, and economic transformation. During the Structural Impediments Initiative (SII) talks of 1989–91, the United States pressed Japan to beef up its antitrust policy in order to reduce barriers to foreign trade and investment. In the last several years, Prime Minister Koizumi Jun'ichirō and officials at the Ministry of Economy, Trade, and Industry (METI) have also advocated stronger antitrust policies in order to boost economic growth and facilitate a shift to a more advanced economy.

John Haley's *Antitrust in Germany and Japan* makes an important contribution to understanding contemporary Japanese antitrust by comparing it with that of Germany. Germany is a particularly apt choice for comparison, not only because of its intrinsic economic importance, but because it served as the model for the pro-cartel policies Japan developed in the 1930s which formed a key part of Japan's industrial policy system. Haley argues that many are mistaken in their understanding of the relationship between Japanese and German antitrust policy. People think Germany and Japan were very similar before the war; in fact, Germany was much more effectively cartelized than Japan. And while many think Germany developed much more rigorous antitrust policy than Japan after World War II, Haley argues that Japan's policy is now roughly equivalent to Germany's.

Haley notes that Japan and Germany were both late-developing economies and that Japan modeled its legal system on Germany's. German court decisions from 1888 to 1897 recognized the right of firms to set up cartels, and by the 1920s Germany was dominated by cartels. Haley argues that, unlike Germany, the Japanese economy was not dominated by private cartels at this time. The effective push for cartels in Japan only came with the es-

tablishment of government-directed cartels under the 1931 Law Concerning Control of Major Industries, and even these government-imposed cartels weren't as powerful as Germany's.

Haley provides an interesting discussion of the three-way relationship between U.S., German, and Japanese antitrust policies in the 1930s and 1940s. A powerful effect of German cartelization was to produce an opposite reaction in the United States. Although the United States had experimented with cartels through the National Recovery Administration in the 1930s, by the late 1930s a revival of antitrust had begun. The German example caused Americans to associate cartels with fascism and reinforced Americans' rediscovered aversion to cartels. Americans then approached the occupation of both Germany and Japan with strong anticartel zeal. According to Haley, Americans with long experience in Japan held that cartels had been ineffective and that Japanese business leaders had opposed the drive to militarist expansion. Haley argues that many of those, such as T. A. Bisson, who argued that Japanese cartels should be restrained, were poorly informed and biased by Marxist or other leftist ideologies (p. 19).

It is a bit difficult to understand the purpose of Haley's criticism of the occupation's proponents of antitrust. Haley implies that antitrust wasn't called for because the problem wasn't so much spontaneous organization of private cartels as government-sponsored cartels. Judging from American experience, though, antitrust has proven to be a very effective tool for contesting government-backed monopoly. Since the 1970s, the United States has found the theories and institutions of antitrust to be a valuable resource in challenging regulation in industries from telecommunications to trucking to airlines. As it turned out in Japan, antitrust played at least some role in reining in METI-backed cartels. Also, to say that Japanese cartels were really not all that effective before and during the war does not mean that the institutions of cooperation and networks established under the control associations were not an important source for industry to draw on after the war. One might wonder if the point of arguing that American occupiers were wrong in their preoccupation with Japan's cartels is to suggest that Japan really didn't need the Antimonopoly Law (AML) after all. Haley does go on to say that Japan's Antimonopoly Law has been fundamentally effective, so I suppose he thinks that the Americans who pushed for the AML were right to do so, even if they did so based on what Haley sees as a faulty and biased analysis of prewar and wartime Japan.

Haley argues that immediately after the war there was divergence between Germany and Japan. While both Japan and Germany had antitrust policies, in Germany prominent politicians such as Ludwig Erhard made a call for a competitive economy a principal part of their message. Japanese leaders, notably Kishi Nobusuke, were openly hostile. Nevertheless, Haley argues that since the 1960s, policy in Germany and Japan has converged and

become more stringent. The heart of the book is a careful comparison of the laws and enforcement institutions. Haley concludes that it is difficult to compare enforcement because much enforcement takes place through informal consultation and because meaningful comparison of fines is impossible.

While Haley's main argument is that German and Japanese policies appear to be roughly similar, he does point out important ways in which Japanese policy is weaker. In Japan the bureaucracy has informal channels of communication with business, and this informality undercuts antitrust. Both German and Japanese antitrust authorities have limited authority to demand information from business, but the problem is worse in Japan. The reason is that "the economic ministries with their diffuse programs to promote Japanese industry, unlike the FTC [(Japan) Fair Trade Commission], need not rely on legal means of coercion to obtain information. It flows with relative ease from those such authorities aid" (p. 129). This difficulty rooted in the wider practices of the economic bureaucracy is exacerbated by other legal differences. Because of hostility in Japan to private litigation, "Japan has left undeveloped even the limited disclosure powers available in Germany" (p. 129).

Another weakness compared to Germany is that Japanese antitrust uses open-ended remedial powers—that is to say, recommendations that law-breakers change their behavior—rather than fines as the primary means of enforcement. And even this power is meager. For one thing, remedial measures only apply to the specific case under review. "If the decision refers to an illegal price-fixing agreement concluded on, say, March 31, 2000, and orders the respondents to eliminate that violation, it would not necessarily apply to an identical agreement concluded the next day" (p. 144). And the FTC lacks sanctions to ensure that violators follow its orders. "Without effective sanctions to enforce compliance, the FTC is left with little other than adverse publicity to ensure its orders are followed" (p. 145).

While Haley argues that it is difficult to compare fines between Japan and Germany, he does compare the Japanese and German system of penalties with that of the United States. Haley notes that the fundamental weakness of sanctions in both Japanese and German antitrust compared to the United States is the lack of an effective system of private litigation.

As a penalty the treble surcharge of illegal proceeds of the GWB [Gesetz gegen Wettbewerbsbeschränkungen, or Law against Restraints of Competition] has obvious if superficial similarity to treble damages under American antitrust laws, as several German commentators have observed. Because of the practical shortcomings of an administratively determined surcharge as opposed to damage actions, however, they do not share functional similarity as an effective sanction. The problem lies in the proof of the amount of illegal proceeds in Germany or damages in the United States. To meet the legal requirements of proof in either case is a difficult and extremely costly task. (p. 146).

In Germany, the work must be done by a small number of civil servants. In the United States, private litigants pay for the costs and hire attorneys to do the work so that it is much more feasible to make the case. Haley notes that because of weak sanctions, antitrust has probably had less impact on behavior in Germany and Japan than in the United States, but that at least in Japan awareness of antitrust seems to have increased in recent years (p. 168).

Thus, Haley suggests that the German and Japanese antitrust systems have been, until recently, less effective than that of the United States, but are both more effective than they were and are roughly equivalent to each other. Then why is it that foreign firms in the 1980s and 1990s seem to have had so much more trouble with informal barriers to trade and investment in Japan than in Germany? Why is it that the United States was pressing Japan to strengthen its antitrust policy but not putting similar pressure on Germany?

Haley suggests that Japan actually has a very competitive economy, although this is not thanks to antitrust but simply to the functioning of the market. The problems lie with excessive government regulations, particularly in the financial industry (pp. 174–75). But Haley hints that a couple of factors may in fact create competition and openness in the German economy not found in Japan. First, Germany is part of Europe. Haley notes, for example, that the greater prevalence of “cartel-like arrangements (such as co-operatives)” in Japanese wholesale markets compared to Germany is due to “geographic differences, as well as . . . the influence of the European Common Market and competition law” (p. 87). Haley here captures one of the central differences between Japanese and German policy. The European Union has strived to create a unified market, and since the 1980s has used greatly strengthened competition policy to this end. It is difficult for German industries to privately restrict competition effectively at the national level in the open economy created by the European Union. The second big difference, noted above, is that, while the policies on the books in Germany and Japan are similar, German political leaders have been more committed to strong competition policy.

The book provides a very useful addition to our understanding of Japanese antitrust policy and stands among the important books that have put Japanese antitrust policy in comparative context and discussed its impact. By comparing the activities of trade associations in Japan and the United States, Leonard H. Lynn and Timothy J. McKeown's *Organizing Business* provided a useful guide to the differential impacts of antitrust in Japan and the United States.¹ Ulrike Schaefer's *Cooperative Capitalism* used JFTC data to show that such violations of the Antimonopoly Law, barely pun-

1. Leonard H. Lynn and Timothy J. McKeown, *Organizing Business: Trade Associations in America and Japan* (Washington: American Enterprise Institute for Public Policy Research, 1988).

ished, were pervasive across the Japanese economy and were a key part of “self-governance” on the part of Japanese industries.² Haley shows carefully that German and Japanese policies are roughly similar, but that Japanese authorities lack key discovery and sanction powers that German authorities enjoy.

The shortcomings of the book stem from Haley’s scrupulous restriction of its scope. The book limits itself to two topics: the political history leading up to the creation of the postwar antitrust codes in the two countries, and a comparison of the contemporary form of these laws and their enforcement. Haley makes only rare references to EU competition law or to the real economy, though as I’ve noted, these occasional comments are insightful and on the mark. Haley is perhaps too rigorous a scholar to indulge himself further with anecdotal remarks about the world beyond the legal matters at hand. But I found myself wishing he had pushed a bit further his analysis of the broader political and economic context. Had he done so, he might have found himself questioning some of the main points of his own argument. If Germany’s setting within the European Union subjects its firms to important competition, then does it really matter if domestic competition policies narrowly construed have converged in Germany and Japan? Doesn’t EU law at this point essentially function as a central part of the competition law governing the German economy? Similarly, if the policies that truly restrain competition in Japan are anticompetitive governmental regulations, why not expand the discussion of the relation between antitrust and the informal powers of the economic bureaucracy? If German and Japanese antitrust are both less effective than American antitrust because of the lack of effective private litigation, why not expand on that point and make it part of the central argument of the book? And, to return to an earlier theme, if American critics of Japanese cartels ended up doing Japan a great service in pushing for the creation of the Antimonopoly Law, why not recognize their wisdom and foresight rather than what Haley calls their misreading of pre-1945 Japanese markets?

But these are quibbles. One comes away from the book with a strong sense of how difficult comparative work is. Laws and institutions don’t match up well, and Haley’s overview of both countries’ antitrust law is an impressive feat. The book raises many questions that will stimulate further research, and its comprehensive treatment of an extensive body of law lays a solid groundwork for scholars to explore the political and economic issues related to this important area of policy.

2. Ulrike Schaefer, *Cooperative Capitalism: Self-Regulation, Trade Associations, and the Antimonopoly Law in Japan* (Oxford: Oxford University Press, 2000).